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NO. 88-247

# In the Supreme Court of the United States

OCTOBER TERM, 1988

PRUDENTIAL—BACHE SECURITIES, INC.,
Petitioner,

vs.

J. RICHARD FINN and REGINA R. FINN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA

## RESPONDENTS' BRIEF IN OPPOSITION

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In The

# Supreme Court of the United States

October Term, 1988

PRUDENTIAL—BACHE SECURITIES, INC.,
Petitioner,

vs.

J. RICHARD FINN and REGINA R. FINN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

## RESPONDENTS' BRIEF IN OPPOSITION

The respondents, J. Richard Finn and Regina R. Finn, respectfully request that this Court deny Prudential-Bache's Petition for Writ of Certiorari which seeks review of the decision of the Fourth District Court of Appeal for the State of Florida.

## STATEMENT OF THE CASE AND FACTS

In June, 1984, respondents, J. Richard Finn and Regina R. Finn ("Finns") filed a nine count complaint in the Circuit Court of Palm Beach County, Florida, against petitioner, prudential-Bache Securities, Inc. ("Prudential-Bache") and its former broker/employee, John Kenning. The Finns' complaint alleges, *inter alia*, that Prudential-Bache and Kenning defrauded the Finns of all of their retirement funds in excess of five hundred thousand dollars. The Finns' causes of action against Prudential-Bache include negligent misrepresentation, fraud,

negligent hiring and supervision, and violation of sections 517.301 and 895.031(3), *Florida Statutes.*

Respondents also instituted a federal court action against Prudential-Bache and Kenning in June, 1984, by filing a complaint in the Federal District Court for the Southern District of Florida, alleging violations of 15 U.S.C. §78j.(b) and §20(a) of the Securities Exchange Act. Both the state court suit and the federal court suit are based upon the same illegal activities of Prudential-Bache and Kenning in handling the Finns' accounts. (Defendant Kenning is now in federal prison as a result of his fraudulent activities in certain other client accounts.)

For several months after institution of the suits in state court and federal court, both parties engaged in extensive discovery, including interrogatories, requests for admissions, requests for production of documents and taking the depositions of the Finns and several other key witnesses. During this period, Prudential-Bache also filed identical motions for summary judgment and for protective orders in both the state court action and the federal court action.

In September, 1984, Palm Beach County Circuit Court Judge, James R. Stewart, entered an order denying Prudential-Bache's motions for summary judgment and for protective order in the state court case. Thereafter, in December, 1984, the Honorable Alcee L. Hastings, United States District Court Judge for the Southern District of Florida, entered an order granting Prudential-Bache's motion for summary judgment in the federal court action. However, in January, 1985, Judge Hastings granted respondents' Motion to Alter or Amend the Judgment and stayed the order granting summary judgment, pending completion of discovery. Both parties then engaged in several more months of extensive discovery.

In April, 1985, Palm Beach County Circuit Court Judge Harold G. Cohen, who had taken over the Finns' state court suit from Judge Stewart, entered an order denying Prudential-Bache's Renewed Motion for Summary Judgment. It was at this point, after the Finns' state court claims had been pending for nearly one year, that the petitioner, Prudential-Bache, first asserted a right to arbitration through a motion to compel arbitration of the Finns' claims. On the eve of trial, the state circuit court granted Prudential-Bache's motion. The Finns then filed a Petition for Writ of Certiorari to the Fourth District Court of Appeal of the State of Florida.

Simultaneously, in May, 1985, upon a renewed motion by Prudential-Bache, Judge Alcee Hastings entered an order in the federal court action granting summary judgment in favor of Prudential-Bache. The Finns appealed this order to the Eleventh Circuit Court of Appeals. Prudential-Bache then filed a Motion to Stay the Finns' state court appeal, pending determination of the appeal to the Eleventh Circuit. The Fourth Circuit Court of Appeal granted the motion and stayed the Finns' state court appeal for more than two years.

In July, 1987, the Eleventh Circuit reversed the summary judgment order entered in the federal court action and remanded the case back to the district court for jury trial of the remaining issues. (Opinion and order attached as Appendix A.) After receiving this result from the Eleventh Circuit, and despite access to pre-trial discovery and the assertion of a counterclaim, Prudential-Bache, after four years of pursuing this litigation, then filed a Motion to Compel Arbitration of the Finns' federal claims in the Florida district court.

Six months later, in February, 1988, the Fourth District Court of Appeal granted the Finns' Petition for Writ of Certiorari and quashed the April, 1985 state court order compelling arbitration. The Fourth District held that Prudential-Bache had waived its right to arbitrate the Finns' claims by taking acts inconsistent with the right to arbitrate. *Finn v. Prudential-Bache Secruities, Inc.*, 523 So.2d 617 (Fla. 4th DCA 1988).

In March, 1988, Prudential-Bache filed a Motion for Rehearing and Motion for Rehearing En Banc of the Fourth District's decision. In its motion, Prudential-Bache argued that the *Finn* decision conflicted with decisions of other Florida appellate courts, including the Florida Supreme Court. Prudential-Bache also argued that the Fourth District had misapplied Florida law. On May 12, 1988, the Fourth District Court denied Prudential-Bache's Motion for Rehearing.

Subsequently, on June 10, 1988, Prudential-Bache filed a Petition for Writ of Certiorari to the Florida Supreme Court seeking to invoke the Florida Supreme Court's discretionary jurisdiction by claiming that the *Finn* decision conflicted directly with decisions of other district courts of appeal within Florida and with decisions of the Florida Supreme Court. The Florida Supreme Court has not yet ruled on the petition. Nonetheless, Prudential-Bache now seeks to invoke the discretionary jurisdiction of this Court pursuant to 28 U.S.C. §1257(3), claiming that the *Finn* decision created a substantive rule of law which is in direct conflict with federal law.

## SUMMARY OF ARGUMENT

Prudential-Bache's Petition for Writ of Certiorari should be denied for lack of jurisdiction and for absence of

conflict between the *Finn* decision, *supra*, and the decisions of other state and federal appellate courts on the same question of law.

## ARGUMENT

## REASONS TO DENY PETITION

### I. THE QUESTION PRESENTED IN THE PETITION HAS NOT BEEN RULED UPON BY A STATE "COURT OF LAST RESORT" AND THUS IS OUTSIDE THE SCOPE OF THIS COURT'S DISCRETIONARY JURISDICTION PURSUANT TO 28 U.S.C. §1257(3)

Petitioner improperly urges this Court to invoke its discretionary power to review the decision of a state appellate court pursuant to 28 U.S.C. §1257(3). The jurisdiction conferred upon this Court by virtue of 28 U.S.C. §1257(3), however, is limited to review of only "final judgments or decrees rendered by the *highest court of a state in which a decision could be had...*" *Id.* (emphasis added); *Banks v. California*, 395 U.S. 708 (1969) (petition for writ of certiorari dismissed for want of jurisdiction where decision on appeal was not one rendered by the highest court of the state).

Additionally, this Court's own rules provide that a writ of certiorari should not be granted unless "there are special and important reasons therefore" such as "a *State court of last resort*...[deciding] a federal question in conflict with the decision of another *State court of last resort* or a federal court of appeals." SUP.CT.R. 17.1 (emphasis added).

A litigant seeking to invoke this Court's discretionary jurisdiction must therefore, *ab initio,* demonstrate compliance with the jurisdictional statue and the Court's rules, both of which require that the decision on appeal be a final judgment from the state court of highest authority to pass on the issue in question. *Banks, supra; Stratton v. Stratton,* 239 U.S. 55 (1915). *Cf. Webb v. Webb,* 451 U.S. 493 (1981). Absent a showing by a petitioner that these threshold requeirements are satisfied, this Court is without jurisdiction to grant certiorari.

Application of these basic principles to this case reveals that the petitioner here has not, and cannot, sustain its burden to demonstrate this Court's jurisdiction. SUP.CT.R. 21.1(e) (iv), (h). This is because, despite the fact that it has petitioned the Florida Supreme Court to review the *Finn* decision, *supra,* Prudential-Bache, by its own admission, now refuses to await that Court's ruling. *Petition at 4.* Instead, Prudential-Bache comes before this Court seeking a grant of its discretionary jurisdiction to review the very same question of law that is currently pending before the Florida Supreme Court.

Further, Prudential-Bache insists that there is legal precedent for its assertion that this Court has jurisdiction to review the decision of an intermediate state appellate court prior to the rendition of a final judgment by that state's court of highest authority. None of the cases cited by Prudential-Bache, however, are directly on point, for in none of those cases was jurisdiction asserted, as it is here, based upon mere speculation that the state court of highest authority would decline to invoke its power of discretionary review.

For example, in the first case cited by petitioner, *Florida v. Meyers,* 466 U.S. 380 (1984), this Court granted

a petition for writ of certiorari only after the Florida Supreme Court denied the State's petition for discretionary review. Similarly, in *Williams v. Florida*, 399 U.S. 78 (1970), another case upon which petitioner relies, this Court granted certiorari only after the Florida Supreme Court held that it lacked jurisdiction to entertain a direct appeal. In both these cases, quite unlike the situation here, the Supreme Court of Florida, as the state court of highest authority, had rendered final judgments from which appeals could be appropriately taken to this Court pursuant to 28 U.S.C. §1357 (3).

Prudential-Bache also cites the case of *Local 174, Teamsters, etc. v. Lucas Flour Co.*, 369 U.S. 95 (1962) in support of its arguments with regard to jurisdiction. Such reliance is misplaced, however, because this Court's ultimate resolution of the jurisdictional issue presented in *Lucas Flour* rested solely upon its preliminary determination that, pursuant to Washington state law, a decision rendered by a department of that state's supreme court but comprised of less than all nine justices of the court, was a final judgment of that state's court of highest authority. On such facts, this Court deemed jurisdiction to be proper pursuant to 28 U.S.C. §1257 and, therefore, granted certiorari. In contrast, the petitioner here is attempting to circumvent the rendition of a final judgment by the state's supreme court through the premature filing with this Court of a petition for writ of certiorari. In such instances, this Court has previously held that it would not assume jurisdiction "by indulging in conjecture as to what would or would not have been the judgment of [a state supreme court] if it had been called upon to exert the jurisdiction vested in it by state laws." *Stratton, supra* at 55.

The final case relied upon by petitioner, *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S.

136 (1987), is also easily distinguished from the present case. In *Hobbie,* this Court granted certiorari because the Florida Supreme Court, pursuant to state statute, was expressly proscribed from exercising any appellate jurisdiction where the decision on appeal was a *per curiam* affirmance issued without opinion. *Hobbie,* therefore, differs significantly from the present case on its procedural facts alone because, in this case, the Florida Supreme Court's jurisdiction is not prohibited, but merely discretionary.[1]

Moreover, the petitioner's very own actions in seeking a writ of certiorari from the Florida Supreme Court belie its arguments presented here with regard to the jurisdiction of that court. Indeed, by seeking to invoke simultaneously both the discretionary jurisdiction of the Florida Supreme Court and the discretionary jurisdiction of this Court, Prudential-Bache had engaged in a course of conduct which amounts to nothing less than appellate forum-shopping. In so doing, Prudential-Bache is asking this Court to abandon well-settled principles of comity within the federal system which "require that the state [appellate] courts be afforded every opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is

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[1] The amendments enacted in 1980 to Rule 9.030(a)(2) of the Florida Rules of Appellate Procedure do not limit the Florida Supreme Court 's discretionary jurisdiction to review decisions of the state's district courts of appeal which expressly and directly conflict with decisions of other district courts of appeal or of the Florida Supreme Court on the same point of law. *In re Emergency Amendments to Rules of Appellate Procedure,* 381 So.2d 1370 (Fla. 1980). Prudential-Bache has petitioned the Florida Supreme Court to issue a writ of certiorari on the grounds that the *Finn* decision, *supra,* expressly and directly conflicts with the decisions of the Fifth District Court of Appeal and the Florida Supreme Court. Therefore, the Florida Supreme Court is not *prohibited* from granting a writ of certiorari to review the *Finn, supra,* decision. Hence, the Fourth District Court of Appeal does not yet constitute the "court of last resort" in Florida for the petitioner.

wholly private, construing and applying the applicable federal requirements." *Webb, supra* at 500. Further, Prudential—Bache's actions constitute an unprecedented abuse of appellate procedure and judicial process which should not be condoned by this Court. Respondents accordingly request that Prudential-Bache's petition for writ of certiorari be denied.

## II. THE FEDERAL ARBITRATION ACT ADDRESSES SOLELY THE RIGHT TO ARBITRATION, NOT PRINCIPLES OF WAIVER UNDER STATE COMMON LAW; THE DOCTRINE OF PREEMPTION, THEREFORE, DOES NOT APPLY AND FLORIDA LAW, NOT FEDERAL LAW, IS CONTROLLING ON THE ISSUE OF WHETHER A PARTY WAIVES ITS RIGHT TO ARBITRATION WHERE A CASE INVOLVES ONLY STATE LAW CLAIMS

Prudential-Bache argues that the Federal Arbitration Act, 9 U.S.C. §2 *et seq.,* creates a body of federal substantive law of arbitrability which somehow applies in this Florida case and which preempts Florida law. Prudential-Bache cites several cases which it claims support this position, including *Southland Corp. v. Keating,* 465 U.S. 1 (1984), *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1 (1983) and *Perry v. Thomas,* 107 S.Ct. 2520 (1987). *Southland* and *Moses Cone,* however, hold only that the issue of whether a particular dispute is arbitrable falls under the purview of federal law, by virtue of the Federal Arbitration Act. Similarly, *Perry* holds simply that, under the Supremacy Clause of the United States Constitution, the Federal Arbitration Act preempts state law with regard to the enforceability, in the first instance, of an arbitration agreement.

The issue addressed by the Fourth District Court of Appeal in the instant case, however, was not whether the Finns' state law claims were arbitrable, but whether Prudential-Bache waived its right to arbitration of otherwise arbitrable claims by inconsistently litigating the case. None of the cases relied upon by Prudential-Bache squarely address the issue of whether the doctrine of waiver is governed by federal law when only state law claims are involved. Indeed, *Perry* does not discuss the issue of waiver at all. It is, therefore, inconceivable that petitioner can assert that these cases support its argument that the Federal Arbitration Act preempts Florida law, as applied by the *Finn* court.

Nonetheless, Prudential-Bache tries to pursuade this Court that the doctrine of waiver is part of the federal statutory scheme. The cases cited by Prudential-Bache are all federal cases, all of which involve federal, not state, claims, or federal claims with pendent state claims. Prudential-Bache has failed to cite even one case to this court that holds that a Florida case, involving only Florida claims, and no federal claims, is governed by federal law on the issue of waiver. While the Federal Arbitration Act applies in both state and federal courts as to the issue of *arbitrability*, where a case involves only state law claims, such as the *Finn* case, state law applies to the issue of waiver of a right to arbitration.

In determining waiver, the Court in this case should look to the laws of Florida, since matters connected with performance of a contract are regulated by the law of the place where the contract is to be performed. *Charles L. Bowman & Co. v. Erwin*, 468 F.2d 1293 (5th Cir. 1972); *Starkenstein v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 572 F.Supp. 189 (M.D. Fla. 1983).

Thus, Florida law, not federal law, is controlling on the issue of whether Prudential-Bache waived its right to arbitration in this case. The Fourth District applied the doctrine of waiver as established in Florida and determined that, by taking actions inconsistent with the right to arbitrate, Prudential-Bache waived arbitration. That decision does not conflict with the cases cited by Prudential-Bache because none of those cases hold that the doctrine of waiver is governed by federal law where only state law claims are involved. Since there is no conflict, Prudential-Bache's petition to invoke discretionary jurisdiction should be denied.

## III. UNDER FLORIDA LAW, PRUDENTIAL-BACHE WAIVED ARBITRATION BY TAKING ACTS INCONSISTENT WITH THE RIGHT TO ARBITRATE

Prudential-Bache asserts that the Florida Fourth District Court of Appeal erred in holding, "that inconsistent acts, standing alone, constitute waiver under the Federal Arbitration Act and that no showing of prejudice is required". *Petition at 6.* That is *not* what the *Finn* opinion held. First, the *Finn* opinion did not discuss waiver in the context of the Federal Arbitration Act since the *Finn* court applied Florida common law in reaching its decision. It is Prudential-Bache which has improperly read such language into the court's opinion. The Fourth District actually stated:

> The cases cited by respondent [Prudential-Bache] make it clear that actual prejudice must be shown only where there is a finding of waiver based on delay of assertion of one's right. A showing of prejudice is not required if waiver is based upon inconsistent acts. *Melamed, supra, Graham Contracting, Inc. v. Flagler County,* 444 So.2d 971 (Fla. 5th DCA 1983) *rev. denied,* 451 So.2d 848 Fla. (1984). Respondent here

> waived not by inaction, but rather by inconsistent acts.

*Finn, supra* at 619-620.

Florida law holds that waiver of the right to arbitration will occur by taking acts inconsistent with such right, such as active participation in the law suit. *Paine, Webber, Jackson & Curtis, Inc. v. Fredray, Inc.*, 521 So.2d 271 (Fla. 5th DCA 1988). *See also, Drexel Burnham Lambert, Inc. v. Warner*, 665 F.Supp. 1549 (S.D. Fla. 1987); *Coral 97 Associates, Ltd. v. Chino Electric, Inc.*, 501 So.2d 69 (Fla. 3rd DCA 1987); *Puchner v. Drexel Burnham Lambert, Inc.*, 498 So.2d 550 (Fla. 3rd DCA 1986); *Wieneke v. Raymond, James & Associates, Inc.*, 495 So.2d 869 (Fla. 2nd DCA 1986). Further, in Florida there is no requirement that prejudice be shown where there has been a waiver by inconsistent acts. *Fredray, supra.*

The present case has been actively and opportunistically litigated by Prudential-Bache since July, 1984, when Prudential-Bache filed its Answer, Affirmative Defenses and Counterclaim to respondents' Complaint, as well as a Motion for Summary Judgment against the Finns. At no time throughout the extensive course of discovery and pre-trial proceedings, which encompassed more that two hundred various pleadings filed by the parties, did Prudential-Bache assert a right to arbitration or even raise the arbitration issue. Indeed, Prudential-Bache's Motion to Compel Arbitration was not filed until the "eleventh hour" and, then, only because the state trial court had denied Prudential-Bache's renewed motion for summary judgment.

It is, therefore, inconceivable that Prudential-Bache now comes before this Court claiming, allegedly in good faith, that it has not waived its arbitration rights. When it

was advantageous for Prudential-Bache to litigate the case, it aggressively and steadfastly pursued all avenues of discovery and pre-trial preparation. However, once Prudential -Bache perceived that it might not prevail in litigation, it vehemently asserted, for the first time, a right to arbitration. Prudential-Bache then embarked upon a course of conduct carefully orchestrated for the sole purpose of avoiding litigation and the potentially unsavory outcome of the litigation. This Court, however, should not be used as the next point of debarkation on Prudential-Bache's interminable quest for a sympathetic forum, nor should this Court be used as a tool or a pawn in the abusive legal sophistry generated by Prudential-Bache.

On the facts present in this case, the Fourth District Court of Appeal was bound by Florida law to conclude that Prudential-Bache had abandoned any rights it had to arbitration through its active participation in the lawsuit and by taking actions inconsistent with the right to arbitration. It is Florida law, not federal law, which governs on the issue of waiver. The decision of the Fourth District Court of Appeal in *Finn* should thus be left undistsurbed by this Court.

## CONCLUSION

Petitioner has inappropriately and prematurely asked this Court to grant certiorari to review the decision of the Fourth District Court of Appeal of Florida in *Finn v. Prudential-Bache*. That petition to invoke discretionary jurisdiction ahould be denied because, first, Prudential-Bache has not satisfied the requirements of 28 U.S.C. §1257(3) by failing to establish the jurisdiction of this Court and, second, because there is no conflict between the *Finn, supra*, decision and the decisions of other Florida appellate courts and federal appellate courts within Florida on the same question of law.

Respondents, J. Richard Finn and Regina R. Finn, therefore respectfully request that this Court deny Prudential-Bache's petition to invoke the discretionary jurisdiction of this Court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 9th day of September, 1988, to CURTIS CARLSON and LLOYD SCHWED, Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., CourtHouse Center, 175 N.W. First Avenue, Miami, Florida 33128-1817.

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# APPENDIX A

J. Richard FINN and Regina R. Finn,
Plaintiffs-Counter-Defendants-Appellants,

v.

PRUDENTIAL—BACHE SECURITIES, INC., etc. and John Kenning, an individual,
Defendants-Counter-Plaintiffs-Appellees.

No. 85-5513

United States Court of Appeals,
Eleventh Circuit.

July 15, 1987.

Retired couple sued broker and brokerage firm for alleged violations of federal securities laws. Brokerage firm counterclaimed for sum allegedly owing on note. The United States District Court, Southern District of Florida, No. 84-8291—CIV-ALH,Alcee L. Hastings, J., granted firm's motion for summary judgment on investors' claim, and investors appealed. The Court of Appeals, Henderson, Senior Circuit Judge, held that: (1) dismissal of defendant's counterclaim at defendant's request cured failure to enter certificate of appeal; (2) investors and brokerage firm were already in "adversarial position," so that investors could not "reasonnably rely" on firm's alleged misrepresentations in signing release; and (3) material question of fact whether lease was obtained by economic duress precluded entry of summary judgment for firm in couple's securities fraud action.

Affirmed in part and reversed and remanded in part.

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Appeal from the United States District Court for the Southern District of Florida.

Before HILL, Circuit Judge, HENDERSON* and BROWN,** Senior Circuit Judges.

HENDERSON, Senior Circuit Judge:

J. Richard Finn and Regina R. Finn appeal from the judgment of the United States District Court for the Southern District of Florida granting summary judgment against them and in favor of John Kenning and Prudential-Bache Securities, Inc. (Bache) in their suit alleging violations of federal securities laws. The district court concluded that a release signed by the Finns barred their claims against Bache as a matter of law. We affirm in part and reverse in remand in part.

The Finns are a retired Illinois couple who sold their business and moved to South Florida in 1981. In August of that year they opened a joint securities acccount with Bache in Boca Raton, Florida. The Finns deposited approximately $500,000.00 in this account, which represented the bulk of their retirement fund.

The Finns informed the Bache agent responsible for their account, John Kenning, that they had never previously traded in stocks or bonds and that they merely wanted

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* *See* Rule 3(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable John R. Brown, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

a conservative return on their investment. Kenning represented to the Finns that he was an experienced securities broker and that they could expect a return of $65,000.00 annually if he were allowed to make investments on their behalf. The Finns gave Kenning their permission to make such investments. In the subsequent months, the Finns relied exclusively on Kenning to explaing the monthly reports they received from Bache and to handle the investment of their retirement funds.

On August 10, 1983, Dennis Easter, Bache's Boca Raton branch manager, phoned Richard Finn and notified him that additional funds in the amount of $530,000.00 were needed to cover losses that had been incurred by the Finns' account. Finn was not aware of any prior losses and had not been advised of any prior shortages. Upon Bache's request, Finn met with Easter and two of Bache's regional managers at 4:30 p.m. on the same day. At this meeting, Finn was told that over $6,000,000.00 in bonds had been purchased by his account and that unless he paid Bache $530,000.00 immediately, the account would be completely liquidated.

On the follwing day, August 11, 1983, Finn spoke to Kenning who told him that Easter was wrong in his assessment of the account and that within a month the market would turn around. At this point, the Finns consulted an attorney, Arthur Sullivan, who arranged a meeting with them for 2:30 p.m. Shortly thereafter, Easter telephoned the Finns and told them that he was ready to liquidate the account. Finn advised Easter that he had not yet talked to his attorney.

At 3:30 p.m., the Finns and their attorney went to Bache's office and met with Bache officials and a New York attorney representing the company. The Bache representatives told the Finns that they had to make up the

shortage in the account or it would be liquidated. The Finns informed Bache that they had no money to pay the equity loss and another meeeting was scheduled for the following morning.

On August 12, 1983, the Finns and their lawyer again met with the Bache representatives. During this meeting, Finn sought an explanation from the representatives as to why his account incurred an indebtedness of over $500,000.00 when it should have been handled in a conservative manner. No explanation was forthcoming from the Bache employees.

During this meeeting, the Finns were shown a financial statement which contained incorrect figures of their assets and net worth. They advised Bache that the financial statement was in error and indicated that Kenning must have fraudulently filled out the form. Also during this meeting. Bache's representatives continued to exert pressure on the Finns by threatening them with liquidation of the account. One of them told the Finns that all of the trading in their account was consistent with Bache's policy and practices and did not constitute violations of the securities laws.

Also on August 12, 1983, the Finns were told that, as an alternative to liquidation, they could sign a release and promissory note. In exchange for the Finns' complete release of Bache and Kenning from all claims, Bache agreed to carry the Finns' bond position by loaning them $410,000.00 in the hope that eventually they could recoup their losses. The Finns also would receive $30,000.00 in cash at the time of the signing of the release. Bache informed the Finns that unless they agreed to execute the release and promissory note by August 15, 1983, Bache would liquidate the account.

On August 13, 1983, the Finns met agains with the Bache representatives and again asked for an explanation of the current statuts of the account. They were not given a satisfactory answer and were told that there was not time for a full explanation because the account was to be liquidated. Subsequently, the Finns signed the release and promissory note.

On August 15, 1983, Bache fired Easter for failing to adequately supervise Kenning. Bache also discharged Kenning and numerous employees in the Boca Raton branch office. Subsequently, Bache filed a lawsuit against Kenning alleging that he had fraudulently handled the account of several customers including the Finns.

Following the dismissals in the Boca Raton office, another broker was assigned by Bache to handle the Finns' account. Under the terms of the promissory note, the Finns had no control over their assets. Approximately six months later, Bache liquidated the account at a loss of approximately $400,000.00. Shortly thereafter, the Finns filed the present action.

The Finns filed their complaint on June 1, 1984,[1] alleging violations of 15 U.S.C. § 78j(b) and Rule 10b-5 promulgated thereunder. On July 3, 1984, Bache submitted its answer which contained the affirmative defense that the Finns' claims were barred by the terms of the release. Bache also filed a counterclaim against the Finns for the $400,000.00 represented by the promissory note.

On July 18, 1984, Bache filed a motion for summary judgment alleging that the Finns's claims were barred by

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[1] The Finns also filed a concurrent state court action that subsequently was stayed pending the resolution of the federal court proceedings.

the release. This motion was filed before any meaningful discovery had taken place. The Finns responded that the release was void because of economic duress and fraud. On December 17, 1984, the district court granted Bache's motion. The Finns then filed a motion to stay the enforcement of summary judgment. The motion for a stay was granted by the court on January 10, 1985 so that the parties could conduct discovery into the transactions surrounding the execution of the release.

After the court stayed the summary judgment order, the parties executed a "Joint Proposed Discovery Schedule" in which they agreed that additional motions for summary judgment could be submitted to the court thirty days after the completion of discovery. Between February 13, 1985 and April 18, 1985, the parties proceeded with further discovery. During this time, the Finns filed two motions to compel discovery and a motion for sanctions based on Bache's alleged failure to comply with two court orders requiring it to produce certain documents. Before the court ruled on these motions, however, Bache filed a motion to dissolve the stay of the summary judgment. This motion was predicated on a memorandum written by the Finns' attorney which summarized the events surrounding the signing of the release. After hearing oral argument on Bache's motion, the district court dissolved the stay entered on January 10, 1985 and granted summary judgment against the Finns. This order was entered before the expiration of the discovery period and before a ruling was made on the pending discovery motions.[2]

On appeal, The Finns assign error on several

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[2] Because the distsrict court decided this case before the discovery period expired, the Finns' motion to supplement the record on appeal, which was carried with the case by a prior panel, is granted.

grounds. First, they claim that the district court abused its discretion by granting Bache's motion to dissolve the stay before meaningful discovery had taken place. Second, they contend that the district court erred by holding that there were no material issues of fact remaining as to the invalidity of the release. And, finally, they urge that there was a lack of consideration for the release.

[1] Before turning to the merits of the appeal, there are several jurisdictional matters requiring resolution. Although the parties have not pressed these issues, we, of course, are obligated to examine our jurisdiction *sua sponte, See Martin v. Campbell,* 692 F.2d 112, 114 (11th Cir. 1982).

[2] At the time the district court dissolved the stay of the summary judgment, Bache's counterclaim was still pending before the court. Therefore, the order granting summary judgment was not a final appealable order. Also, the district court did not enter a Rule 54(b) certificate permitting the appeal. After the notice of appeal was filed, however, the district court dismissed Bache's counterclaim at Bache's request. This dismissal cured the defect caused by the district court's failure to issue a Rule 54(b) certificate. In *Campbell, supra,* the court, faced with the same problem, stated that "there is an exception to the requirements of Rule 54(b) that allows the separate appeal of a nonfinal judgment where a subsequent judgment of the district court effectively terminates the litigation." *Id.* at 114. *See also Jetco Electronic Industries, Inc. v. Gardiner,* 473 F.2d 1228, 1231 (5th Cir.1983).[3] Accordingly, Rule 54(b) is not a bar to appellate review in this instance.

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[3] In *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir.1981) (en banc), this court adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981.

[3] The other jurisdictional issue involves Fed.R.Civ.P. 58 which provides that a final judgment must be "set forth on a separate document." There is authority in this circuit that an order granting summary judgment is not by itself an appealable order. *Calmaquip Eng. West Hemisphere v. West Coast Carriers,* 650 F.2d 633, 635-636 (5th Cir. Unit B 1981).[4] In this case, the district court did not enter a final judgment separate from the order granting summary judgment. Bache, however, has never objected to the taking of the appeal without the entry of a separate final judgment and consequently has waived the Rule 58 requirement. *Bankers Trust Co. v. Mallis,* 435 U.S. 381, 387-388, 98 S.Ct. 1117, 1121, 55 L.ED.2d 357 (1978). *See also Stein v. Reynolds Securities, Inc.,* 667 F.2d 33, Fn. 1(11th Cir.1982) (parties can waive Rule 58 requirement of separate document). Because Bache waived this omission, there is appellate jurisdiction over this controversy.

The district court granted Bache's motion for summary judgment because it believed that the release signed by the Finns barred their claims as a matter of law. This release contained the following language:

> In consideration of the foregoing the undersigned release and forever discharge PBS. . . its present and prior officers, directors and employees from any and all claims or causes of action, that have arisen or may arise in law or in equity in connection with any and all investments.

Record Excerpts at 39-41. the Finns claim, however, that they were induced to enter into this release because of

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[4] In *Stein v. Reynolds Securities, Inc.* 667 F.2d 33, 34 (11th Cir. 1982), the Eleventh Circuit adopted as precedent all decisions of Unit B of the former Fifth Circuit.

fraudulent representations made by Bache representatives during the three days immediately preceding the signing of the release and because of economic duress exerted by Bache. The district court held that the Finns failed to point to any material issued of fact respecting either defense.

The issue before us is whether the district court correctly concluded that there existed no material issue of fact as to the Finns' claims of fraud and duress. *Mercantile Bank & Trust v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir.1985). In making this determination, we view the evidence in the light most favorable to the nonmoving party. *Id.* If reasonable minds could differ on any inferences arising from undisputed facts, summary judgment should be denied. *Id.*

[4] The Finns claim that the release does not bar their claims because it was procured by fraud. In order to establish fraud under Florida law,[5] a plaintiff must prove 1) the defendant made a false representation of a past or present fact, 2) the defendant knew the statement was false, 3) the statement was made for the purpose of inducing the plaintiff to rely on it, and 4) the plaintiff's reliance was reasonable. *Pettinelli v. Danzig*, 722 F.2d 706, 709 (11th Cir.1984).

In the present case, the Finns allege that Bache's representatives knew that Kenning's conduct violated the securities laws but lied about his conduct in an effort to induce the Finns to sign the release. the district court assumed the truth of these allegations but nonetheless concluded they did "not legally justify an invalidation of the release." Record Excerpts at 263. In arriving at its decision, the court relied on *Pettinelli, supra.* In *Pettineli,* the plaintiffs were investors in a corporation devoted to land development.

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[5] The release explicitly provides that Florida law governs it terms.

They claimed that the directors/defendants breached their fiduciary duties and illegally caused stock dilution. The defendants moved for summary judgment citing a release that had been previously entered into by the parties. The *Pettinelli* court found that the plaintiffs could not rely on fraud as a defense to the release because they were in an adversarial position with the defendants, and hence could not rely on any of their representations. *Id.* at 710. *See also Columbus Hotel Corp. v. Hotel Management Co.,* 116 Fla. 464, 156 So. 893 (1934). The court noted that "throughout this negotiation period appellants knew from their own dealings that they should not rely on any representations made by defendants. . . . When negotiating or attempting to compromise an existing controversy over fraud and dishonesty it is unreasonable to rely on representations made by the allegedly dishonest parties." *Pettinelli* at 710, *relying on Sutton v. Crane,* 101 So.2d 823 (Fla.Dist.Ct.App.1958).

In the present case, the district court found as a matter of law that the parties were in an adversarial relationship and therefore the Finns, like the plaintiffs in *Pettinelli,* had no right to rely on any of Bache's representations. The Finns maintain that there are material issues of fact remaining on this question and that the fiduciary nature of the relationship between Bache and the Finns made reliance upon Bache's representatives reasonable. We disagree. After the Finns were notified of their indebtedness, they retained an attorney to negotiate with Bache. During the negotiations, the Finns learned that a financial statement representating their net worth had been fraudulently submitted by a Bache employee, probably Kenning. Furthermore, the Finns' attorney drafted a memorandum shortly after the release was signed noting that he "explained to Mr. Finn that he probably had a good securities case against Prudential-Bache." Record on

Appeal, Vol. III at 674. And, the Finns on at least two occasions inquired of Bache representatives the reason for the mismanagement of their account and were dissatisfied with Bache's responses. In light of all of these facts, it is clear that the positions of the Finns and Bache were antagonistic and the parties were attempting to compromise an existing controversy relating to Bache's alleged mishandling of the Finns' account. Under Florida law, the Finns had no right to rely on Bache's representations and the district court properly granted summary judgment on the fraud claims.[6]

[5] The Finns also claim that they are not barred by the release because it was procured under conditions amounting to economic duress. The defense of duress is recognized by Florida law. *See e.g., Scutti v. State Road Dept.*, 220 So.2d 628 (Fla. Dist.Ct.App.1969). the district court's entire discussion of the Finns' duress cause of action is found in one paragraph on page 5 of its original order granting summary judgment. The court stated as follows:

> As held in the case of *Friedman v. Bache & Co.*, 321 F.Supp. 347 (S.D.Fla. 1970), *aff'd*, 439 (5th Cir.1971), a case involving a release being given in exchange for a broker's forbearance to liquidate a brokerage account, 'duress' of the nature alleged by plaintiffs in this cause [sic] cannot defeat a release as a matter of law.

Record Excerpts at 264.

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[6] The Finns' argument that the fiduciary nature of their relationship with Bache justified their reliance ignores the fact that the plaintiffs in *Pettinelli* were in a similar relationship with the defendants and nevertheless the court held that any reliance was unreasonable as a matter of law.

The district court's reliance on the *Freidman* decision is misplaced. In *Freidman*, an investor brought suit against an investment firm alleging that the firm placed improper restrictions on her account. The firm moved for a directed verdict on the basis of a release executed by the plaintiff. The district court granted the motion stating:

> [I]t is well established that duress cannot be predicated upon a threat of the performance of an act which a person has a lawful right to perform and duress is not established *merely* by proof that consent was secured by the pressure of financial necessity. . . . [Citations omitted.] *Plaintiff herein has failed to prove that any act of defendant was unlawful or that the pressure, if any, exerted upon her was anything other than that of her own financial circumstances which . . . were neither limited nor extreme.*

*Id.* at 350. (emphasis added).

The present case is distinguishable from *Freidman* in three significant aspects. First, unlike the plaintiff in *Friedman*, the Finns have raised numerous factual issues relating to the investment firm's alleged unlawful management of their account. Second, the pressure placed on the Finns to sign the release was not the result of any voluntary acts on their part but on the alleged fraudulent activities of Bache's representatives. Third, whereas the financial circumstances of the plaintiff in *Freidman* were "*neither* limited nor extreme," the Finns' financial means were *both* limited and extreme.

Bache argues that the Finns' assertion of duress fails as a matter of law because Bache had a legal right to liquidate the Finns' account and therefore the threat of liquidation cannot rise to the level of duress under Florida

law. There are, however, material issues of fact as to whether Bache had the legal right to liquidate the account. If the Finns' allegations that Bache fraudulently and unlawfully mismanaged their account are taken as true, as they must for the purposes of this appeal, then Bache's liquidation of the account could very possibly have given rise to a cause of action for unlawful liquidation. *See Modern Settings, Inc. v. Prudential-Bache Securities, Inc.*, 603 F.Supp. 370, 374-75 (S.D.N.Y.1985). If we followed Bache's reasoning, an investment firm could illegally manipulate a customer's account to create a large indebtedness and then use the threat of liquidation as a tool to secure a release of all claims against the firm. We cannot sanction such a result.

In *City of Miami v. Kory*, 394 So.2d 494 (Fla.Dist.Ct.App.1981), the court noted that "there are in essence two factors which must coexist in order to establish duress . . . . It must be shown (a) that the act sought to be set aside was effected involuntarily and thus not as an exercise of free choice or will and (b) that this condition of mind was caused by some improper and coercive conduct of the opposite side." *Id.* at 497. The question before us is whether there are material issues of fact relating to both of these elements. The Finns assert that Bache illegally manipulated their account to the point where the Finns owed over $500,000.00 and that because of that indebtedness, coupled with the Finns' lack of any other meaningful assets, they had no choice but to sign the release in order to have an outside chance of recouping their losses. We find that these allegations raise triable issues of fact as to the claim of duress. The district court's order granting Bache's and Kenning's motions for summary judgment was erroneous and the case is remanded for a trial on the issue of duress and any other relevant

questions.[7]

AFFIRMED in part and REVERSED and REMANDED in part.

JOHN R. BROWN, Senior Circuit Judge, concurring and dissenting:

While I concur with the majority's reversal and remand to the trial court on the issue of duress, I dissent from the majority's decision to uphold the grant of summary judgment based on the validity of the release bottomed on this circuit's opinion in *Pettinelli v. Danzig,* 722 F.2d 706 (11th Cir.1984). Viewing the record in a manner most favorable either to the Finns or to Bache, material issues of fact exist that should be decided by a jury (or judge fact-finder) as to whether Bache and the Finns were in an adversarial relationship when the Finns executed the release.

From a reading of the majority's opinion, the opinion does not, as required, demonstrate beyond genuine factual controversy at what point the Finns should have known to stop treating Bache as their trusted financial advisor, after which the law would compel them to view Bache as only an adversary with competing, conflicting interests. As is so often the case, the facts make the most powerful legal argument. At the precise point in time at which Bache was extracting the release of *its* liability to the Finns, Bache had made the decision, implemented two days later, that it would fire, i) Easter, the branch manager, ii) Kenning, the account mastermind, iii) Richard Kiel, operations manager

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[7] Because of our disposition of this case, we need not address the Finns' argument that the district court abused its discretion by curtailing discovery prematurely. We also note our agreement with the district court that thee Finns' claim that the release is void for lack of consideration is without merit.

in Boca Raton, iv) John Carpenter, another broker there, v) Gary Kramer, an office employee, and vi) Easter's secretary. Further, Bache was clearly making plans to bring the lawsuit against Kenning alleging *fraudulent* mishandling of the Finns' and others' accounts. Bache knew of all these pending or completed actions, yet withheld all knowledge from the Finns, *until* they signed the release.

Certainly, the majority does not deny that at some point a fiduciary relationship existed. As a matter of summary judgment law, this relationship was not necessarily extinguished because the Finns brought Arthur Sullivan, their attorney, with them to some of the meetings. As a fiduciary, Bache was required to disclose fully to the Finns, prior to executing the release, all of its conduct concerning the way their account was handled. "[A]n affirmative duty to disclose exists in Florida only if there is a fiduciary relationship between the parties or the facts are solely within the knowledge of the representor or some trick has been employed to prevent an independent investigation by the representee." *Hauben v. Harmon*, 605 F.2d 920, 924 (5th Cir.1979). In the instant case, we have i) a relationship, ii) facts solely within the knowledge of Bache and iii) no practical way for the Finns to investigate Bache's representations and omissions. The "negotiations" between the Finns and Bache occurred largely during a three-day period. Not beyond summary judgment dispute, the Finns attended the meetings in an informational capacity, attempting to find out how they could have trusted—and lost—their life savings to a major brokerage firm and end up owing that firm more than $400,000.00. While amazement, bewilderment and consternation abound in this case, there is no semblance either of hard bargaining or awareness that the parties had to consider that the discussion was between sophisticated adversaries, conscious that they were, not the beneficiaries of the laws' demands on a fiduciary, but

simply strangers now in an adversarial role.

The court holds that as soon as the Finns brought Mr. Sullivan into the picture, the relationship changed altogether from one of trusting beneficiaries and a trustworthy fiduciary into one of strangers locked in mortal (financial) combat. They were, as a matter of law, so the trial court's summary judgment holds, sufficiently protected from Bache's misrepresentations or over-reaching. It is important, however, to look at the actions of that attorney once he entered the process. A jury (fact-finder or judge) could find that his role was not that of an informed, zealous, loyal advocate. Rather, his detailed post-conference file memorandum to himself was not made as an historical record of the events. It was made to save his hide in a malpractice claim which any Florida litigant (and counsel) could reasonabaly expect.

Further, although Bache was engaging in reprehensible practices that might well have put a person on notice not to trust its representations, the cumulative effect of Bache's mistreatment of the Finns is clearly demonstrated in the hindsight that the motion for summary judgment imposed on the trial court.

During the short three-day "negotiations" period, the Finns were in no position—and their so-called counsel made no effort to assist them—to obtain the necessary information to know that the tables were now turned and they would have to start dealing with Bache in an arms-length, hostile manner. A factfinder (jury or judge) could find that the Finns had a right to rely on Bache's continued obligations to act as a fiduciary and thereby to rely on its representations. There was a genuine controversy on the critical, decisive facts. The trial court could not properly conclude on summary judgment that the Finns had not

stated a cause of action of fraud under Florida law. *Pettinelli*, 722 F.2d at 709.

While the *Pettinelli* case is indeed similar and authoritative, I cannot find it controlling here. As I read *Pettinelli*, it holds that '[w]hen negotiating or attempting to compromise an existing controversy over fraud and dishonesty it is unreasonable to rely on representations made by . . . allegedly dishonest parties." *Pettinelli*, 722 F.2d at 710. The factual controversy is wide open over whether the Finns either would know, or have access to information that would lead them to find out that they were now dealing with persons who just recently were their friendly, compensated advisors and champions whose role had suddenly changed into one of hostile combatants and who, by some quirk of the law were now free to lie, misrepresent or cheat their one-time valued client.

Up until the time of the margin call on their bonds, the Finns had seen Bache—as their friendly, honest local broker, dispensing expert financial advice with a broad smile, a firm handshake, and, of course, gratitude for all the commissions earned, or at least, received. Suddenly, the court holds, sometime in the span of 72 hours, this retired midwestern farming couple should have miraculously acquired the skeptical savvy of moral-less Wall Street to realize that those whom they had trusted not only could no longer be trusted, but that they could not accept as gospel what these merchants of deception were saying.

What is worse, all this is done in the name of no genuine controversy of fact. Summary judgment is indeed being used to deny a trial of the critical facts.

More important, in *Pettinelli*, "[t]he parties were both represented by counsel and *specifically advised not to*

*rely on any representations* . . . . From the beginning of the negotiations it was clear that the parties were in an adversarial relationship . . . . Throughout this negotiation, appellants knew from their own dealings that they should not rely on any representations made by the defendants." *Id.* (citations omitted) (emphasis supplied).

I cannot see how a rule of law, announced for seasoned, truly lawyer-advised, adversaries locked in a dispute of a litigable claim can be applied to two financially inexperienced and trusting Illinois farmers who had seen their life savings turn into $400,000.00 of debt. The court's sole reliance for this critical conclusion that, as a matter of law the parties were in an adversarial relationship, is derived from the memorandum prepared by attorney Sullivan two days after the Finns signed the release.

In simple terms, a fact-finder (jury or Judge) could readily find that Bache defrauded the Finns. The execution of the release was just another episode in the same series. A genuine issue of fact existed as to whether the Finns had to be conscious that the fiduciary relationship was an end so that as very new adversaries, they had no reasonable expectation to rely on the representations of Bache *at the time they signed the release.* Therefore, the trial court was in error in granting summary judgment on that issue.

I, therefore, respectfully dissent.